United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

ORIGINAL

75-2067

B
P/S

United States Court of Appeals

For the Second Circuit.

HAROLD SHATZ,
Petitioner-Appellant,

-against-

UNITED STATES OF AMERICA,
Respondent-Appellee.

On Appeal from the United States District Court for the Eastern District of New York

APPELLANT'S APPENDIX

DANIEL J. GOTLIN
Attorney for Appellant Harold Shatz
401 Broadway
New York, N.Y. 10013
(212) 966-5897

DICK BAILEY PRINTERS – TEL. (212) 447-5358

3

PAGINATION AS IN ORIGINAL COPY

74C 1272 DOCKET

SEC. 2255

SHEET #1

J. GRIESA, J.

TITLE OF CASE	ATTORNEYS
HAROLD SHATZ vs. UNITED STATES OF AMERICA	*For Plaintiff:* Harold Shatz Pro Se U.S. Penitentiary P.M.B. - 76680-158 Atlanta, Georgia 30315 *For Defendant:* H. SPENCER KUPPERMAN,ESQ. (firm of Jackson & Kupperman Esqs. 189 Montague St.,Bklyn.,N.Y. 11201 Tel:858-2890 (Appointed by the Court) For Defendant:

BASIS OF ACTION: pursuant to Sec. 2255
(Related Case 72-CR-465)

JURY TRIAL CLAIMED
ON

DATE	PLAINTIFF'S ACCOUNT	RECEIVED		DISBURSED		DATE	DEFENDANT'S ACCOUNT	RECEIVED		DISBURSED	
1-3-74	Motion (2255)	--	--								

ABSTRACT OF COSTS			RECEIPTS, REMARKS, ETC.
TO WHOM DUE	AMOUNT		

74C 1272 HAROLD SHATZ v. UNITED STATES OF AMERICA

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED EMOLUMEN RETURNS	
9-3-74	Motion filed pursuant to Sec. 2255 (PE: 72 CR 465)	1	J
9/25/74	By WEINSTEIN,J.- Memorandum and Order dated Sept. 24, 1974 filed		
9-24-74	BY WEINSTEIN, J. MEMORANDUM and ORDER FILED. The court requests the respondent to furnish the transcript of the sentencing proceedings to the court and petitioner before it determines the third point. The Clerk of the Court shall send a copy of this Memorandum and Order to petitioner and to the U.S. Atty., etc. SO ORDERED. (See Memo., etc.)	2	
9-25-74	Copy of letter of Clerk of Court filed dated Sept.25,1974 addressed to Edward C. Jaegerman, Esq., re enclosure of a copy of memo., - cc: U.S. Atty.,E.D.N.Y.	3	
10-7-74	Traverse to Government's Memorandum filed.	4	
10-8-74	BY WEINSTEIN, J. MEMORANDUM and ORDER FILED. If the plaintiff wishes counsel assigned and has no funds, he may inform the court of this fact. The government shall arrange for a hearing at an early date and produce the prisoner for such a hearing. The Clerk of the Court shall send a copy of this Memo., etc., to plaintiff and to the U.S. Attorney. SO ORDERED. (See Memo.,etc.)	5	
10-9-74	Copy of letter of Clerk of Court filed dated October 9, 1974 dated Oct. 9, 1974 re enclosure of a copy of memo., etc.	6	
11-4-74	PETITION FILED of STEPHEN BEHAR, Assistant U.S.Atty., etc.	7	
11-4-74	Writ issued (returnable Nov. 12, 1974 at 9:30 A.M.)		
11-12-74	Copy of letter of WEINSTEIN,J. dated November 8, 1974 addressed to petitioner herein, re H. Spencer Kupperman, Esq., who was appointed to represent him in this matter, etc.	8	
11-12-74	Before WEINSTEIN, J. Case called. Defendant present. Counsel not present. Hearing adjourned to Nov. 19, 1974 at 10:00 A.M.		
11-13-74	WRIT RETURNED AND FILED.	9	
11-19-74	Before WEINSTEIN, J. Case called. Defendant present without counsel. Counsel to be appointed and a new probation report to be submitted. Hearing adjourned without date.		
11-22-74	Copy of letter by Law Clerk to WEINSTEIN, J. Dated Nov. 20,1974 filed, addressed to Mr. Harold Shatz, etc.	10	
1-22-75	Letter of Daniel J. Gotlin filed dated Jan. 13, 1975 addressed to WEINSTEIN, J. re assignment of an investigator in this proceeding, etc	11	
1-22-75	Copy of letter of Clerk of Court filed dated Jan. 22, 1975 addressed to Chief Judge, IRVING R. KAUFMAN, U.S.C.A., re enclosure of vouchers for authorization, etc. CONTD	12	

74-C-1272 HAROLD SHATZ vs. U.S.A. **SHEET #1**

CIVIL DOCKET

DATE	FILINGS—PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT
2-4-75	Letter of petitioner herein filed dated Jan.31,1975 addressed to WEINSTEIN, J., together with a reply from WEINSTEIN, J., etc.		13 & 14
2-6-75	Copies 1 and 4 were on this day mailed to Chief Auditor, Administrative Office, etc.		
2-6-75	Copies 2 and 5 filed ($350.00) - Vouchers re payment.		15 & 16
2-6-75	Copy 3 mailed to Frischling Research Bureau, 94-14 37th Avenue, Jackson Heights, N.Y. 11372		
3-4-75	Petition filed of Stephen M. Behar, Assistant U.S. Atty., for the issuance of a writ of Habeas Corpus ad Testificandum.		17
3-4-75	Writ issued.		
3-7-75	Letter of Daniel J. Gotlin filed, dated March 4, 1975 addressed to WEINSTEIN, J.		18
3-24-75	Before WEINSTEIN, J. Case called. Defendant and counsel present. Hearing ordered and begun. Hearing concluded. MOTION DENIED. the petition is dismissed. Order to be submitted. Court's Findings read into the record.		
3-24-75	BY WEINSTEIN, J. MEMORANDUM AND ORDER FILED. The plaintiff's motion to set aside his conviction based upon newly discovered evidence is DENIED in all respects, etc. (for further entries, see 72-CR-465)		19
3-25-75	Writ dated March 3, 1975 returned and filed.		20
3-25-75	Writ dated Nov. 4, 1974 returned and filed.		21
4-2-75	NOTICE OF APPEAL FILED. (HAROLD SHATZ)		22
4-2-75	Copy of Notice of Appeal was on this day mailed to U.S. Atty., E.D.N.Y.		
4-2-75	Copy of Notice of Appeal was on this day mailed to Clerk, U.S.C.A.		
4-2-75	Copy of Instructions re preparation of record, etc., was on this day handed personally to DANIEL J. GOTLIN,ESQ., together with forms C and D , etc.		
4-22-75	Copy of letter of Clerk of Court filed dated April 22,1975 addressed to Hon. Irving R. Kaufman, etc., re CJA 20 Appointment affirmation, etc.		23

9/10/74 Respond 6/9/1974

721020. Peter Cl 10-12-72

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK
BROOKLYN, NEW YORK
----------------------------------x

APPEAL # 3116 F# 725365 DEARIE Cl 9-2-2

HAROLD SHATZ,

Petitioner

vs.

CIVIL ACTION NUMBER

74 C 1272

UNITED STATES OF AMERICA,

Respondent
----------------------------------x

MOTION TO VACATE SENTENCE

CRIMINAL NO.
72 CR 465

Harold Shatz, Petitioner Pro Se
United States Penitentiary
P.M.B. - 76680-158
Atlanta, Georgia 30315

A-4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
BROOKLYN, NEW YORK
----------x

HAROLD SHATZ,

Petitioner

vs. CIVIL ACTION _____

UNITED STATES OF AMERICA,

Respondent
----------x

MOTION TO VACATE SENTENCE

COMES NOW HAROLD SHATZ, petitioner in propria persona, and moves this Court, pursuant to Title 28, UNITED STATES CODE, Annotated, Section 2255, to vacate his Judgment and Sentence issued on October 18, 1972, in Indictment No. 72 CR. 465 in this Court, and respectfully shows the Court as follows:

-1-

Petitioner is presently incarcerated at the United States Penitentiary Atlanta, Georgia, serving a ten (10) year sentence as handed down on October 18, 1972, in Indictment No. 72 CR 465.

-2-

Petitioner is presently committed on a conviction and sentence as aforementioned which is invalid, null andvoid.

-3-

That the afore-mention Conviction and sentence are invalid and void in that it was issued in violation of this petitioner's rights under the Fifth, Sixth and Fourteenth Amendment to the Constitution of the United States, in that:

(a) The Government and/or its agents knowingly and intentionally utilized perjured testimony, which testimony was of a devastating and crucial nature, to convict this Petitioner;

(b) The prejudicial, insinuating, and inflamatory statements made in open court were of a nature that it deprived the petitioner of a fair and impartial trial;

(c) That the Court made conflicting charges to the Jury, thereby, denying the petitioner equal protection of the law.

-2-

-4-

That the Government and/or its agents prejudiced the petitioner through the selective prosecution, contrary to the Equal protection of the Law;

-5-

The Court permitted testimony to be introduced, through the testimony of Government Witness (BRUGMAN), that adversely impeached the credibility of the petitioner without the petitioner taking the stand, thereby, permitting a waiver of his Fifth Amendment Rights, without the petitioner knowingly or freely giving a waiver of this right.

-6-

The petitioner was not aware of the grounds underlying this motion when he filed his appeal, (see paragraph 3(a)).

-7-

The records and files in Indictment Number 72 CR 465 do not conclusively show that this petitioner is not entitled to relief. Petitioner submits that he, the records, and the files will support his claim, and would respectfully show that the Court should ORDER the production of the plea agreements, and sentencing documents of all the State Charges pleaded to by Government witness BRUGMAN, IN RETURN FOR HIS TESTIMONY, in the instant cause.

WHEREFORE, Petitioner respectfully prays that this Court ORDER the Government to show cause on a date certain, why petitioner's Motion should not be granted, thereby granting a prompt hearing in order that this Honorable Court, pursuant to 28 U.S.C.A. § 2255, may determine the issues and make finding of fact and conclusions of law in respect thereto; and that this Court should vacate and set the Judgment aside handed down by this Court in Indictment 72 CR 465, on October 18, 1972, thereby discharging the Petitioner from custody of the United States Government, and further, that this Court direct the Government to produce the petitioner at the above mentioned Hearing so that he may be of assistance to his counsel at said Hearing.

STATE OF GEORGIA)
: ss
COUNTY OF FULTON)

Harold Shatz, Petitioner Pro Se

SWORN TO AND SUBSCRIBED BEFORE ME THIS 28 DAY OF AUGUST, 1974.

PAROLE OFFICER.

Parole Officer: Authorized by the Act of June 7, 1955 (69 Stat. 143) (18 U.S.C. 4004).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

HAROLD SHATZ,

Petitioner

vs.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE SENTENCE

UNITED STATES OF AMERICA,

Respondent
----------x

Petitioner, along with EDWARD BRUGMAN, EFRAIN RODRIQUEZ and JOHN ARROYO, were indicted in the District Court in No. 72 Cr. 465, on April 27, 1972, in a two count indictment charging conspiracy to violate 18 U.S.C. § 1951. On July 31, 1972, BRUGMAN, pled guilty to a superceding information 72 Cr 919, and RODRIQUEZ pled guilty to Count 1, of the indictment. On October 16, 1972, a motion for severance was granted to ARROYO, and he, on October 18, 1972, pled guilty to superceding information 72 Cr 1168.

On October 18, 1972, the jury returned a verdict of guilty (obtained after sending a note out about being unable to reach a verdict and that further deliberation would not be of any use), and the Court immediately imposed sentences of ten (10) years, concurrently on each count under the provisions of 18 U.S.C. § 4208(a)(2).

The Court has wide and varied powers in the Federal Judicial System as to how and why he imposes sentences on a convicted defendant, and pursuant to Rule 32(c)(1)(2), Federal Rules of Criminal Procedure, Title 18, has within hisdiscretion of ORDERING, or not ORDERING a pre-sentence investigation report, and in the instant case the Court imposed the sentence without the benefit of such a report. In the instant case, since the petitioner did not take the stand, and since the Court permitted the Government Witness BRUGMAN to impeach, by inference, the petitioner's credibility, it is submitted that the Court, should have excused itself from the imposition of a sentence, see:

United States vs. Rosner, 485 F. 2d 1213(1973):

"We are of the opinion that a proper reading of the scope of F.R.Cr. P., 32, in the unusual circumstances of this case, compels a remand for re-sentencing. The re-sentencing should be done by another judge. On the facts of this case we adopt the rationale of the 1st Cir. it is difficult for a judge, having once made up his mind, to resentence a defendand, and both for the judge's sake and the appearance of Justice, we remand this case to be redrawn, Mawson Vs. U.S., 463 F. 2d 29 (1Cir. 1972)."

Im the instant case, the Government failed to make a full disclosure to the Court or the jury the promises made to the witness in return for his testimony.

It has been clearly established that where the Government knowingly and intentionally uses perjured testimony to obtain a conviction, said conviction is invalid. In Napue vs. Illinois, 360 U.S. 264, 3 L.Ed. 2d 1217, 79 S.Ct. 1173, decided June 5, 1959, the United States Supreme Court, in an unanimous decision, reversed a conviction so obtained. In the Napue case, the facts are strikingly similar in that the principal witness testified in response to a question by an attorney for the state that he had received no promise of consideration in return for his testimony. The state attorney knew that this testimony was false, but did nothing to correct it. Justice Warren in writing the opinion stated:

> "First, it is established that a conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment (citations omitted) the same result obtains when the State, although not soliciting false evidence, allowsit to go uncorrected when it appears, Alcorta vs. Texas, 355 U.S. 28, 2 L.Ed. 2nd 9, 78 S.Ct. 103; United States ex rel Almeida vs. Baldi, 195 F. 2d 815; United States Ex Rel Thompson vs. Dye, 221 F. 2d 763; United States Ex. Rel. Montgomery vs. Regan, 86 F. Supp. 382. The principle that a state cannot knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes nonly to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence and it is up such subtle factors that the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." (Emphasis supplied).

In another Supreme Court decision factually on point, Giglio vs. United States, 405 U.S. 150, 31 L. Ed. 2nd. 104, 92 S.Ct. 763, the prosecutor not only failed to disclose that a "deal" had been made with a key witness against the defendant, but also elicited denials of any "deal" from said witness when he testified.

In Giglio, supra, Chief Justice Burger, in writing the unanimous opinion, stated:

> "As long ago as Mooney vs. Holohan, 294 U.S103, 79 L. Ed. 791, 55 S.Ct. 340, this Court made clear that deliberate deception of a Court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice'. This was reaffirmed in Pyle vs. Kansas, 317 U.S. 213, 87 L. Ed. 214, 63 S.Ct. 177 (1942)....."

In the instant case the Court and the United States Attorney's prejudicial comments, in conjunction with the failure of the Government to fully disclose it's "deal" with the witness was sufficient to cause the jury, after a "hopeless dead lock" to cast their vote against the petitioner. Such state-

ments made, as follows, by the prosecutor, must be grounds for relief under the instant collateral attack:

See Transcript (TR-8, Line 19-23):

"It will prove that he master minded the plan and that the plan wasn't a new one in his mind; that this was a tried and true plan; that he had taken this plan and used it before....."

(TR-10, Line 3 to 7):

"We will prove the defendant Harold Shatz didn't choose honest men for criminal work, but he went out and chose an expert in the field, a criminal, and that the men he chose to carry out his plan were criminals."

(TR-22, Line 11 to 14):

".....and when Brugman was arested, Shatz's criminal empire began to fall and Brugman started talking to the authorities."

As held in Hall vs. United States, 419 F. 2d. 582, 587 (1969), in reaffirming Steele vs. United States, 222 F. 2nd 628, stated that irrespective of the fact that there was no objection:

"This type of characterization of an accused not based on evidence, is especially likely to stick in the minds of the jury and influence it's deliberations out of the usual welter of grey facts it starkly raises ....succinct, pithy, colorful and expressed in a sharp break with the decorum which the citizen expects from the representative of his government."

In the words of United States vs. Webb, 463 F. 2d 1324, 1328 (5th Cir. 1972), the remark of the Government violates Rule 52(b) since it does "rise to thatlevel", a level where it can be categorically stated that "improprieties in the prosecutor's jury arguments constitute plain error." See also Lawn vs. United States, 355 U.S. 339 (2nd Cir. 1958).

The very fabric and substance of our criminal judicial system would lie in tatters if the conviction in the instant case were allowed to stand. As stated in Brady vs. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S.Ct. 1194, wherein the Court referred to Mooney vs. Holohan, supra.:

"The principle of Mooney vs. Holohan is not the punishment of society for the misdeeds of a prosecutor, but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted, but when criminal trials are fair: Our system of the administration of Justice suffers when any accused is treated unfairly....."

The Court attempted to correct some of the harmful errors of the prosecutor, however, after fairly explaining the U. S. Attorney's errors, he then permitted the trial to continue; see the excerpts from the transcripts:

(TR-15, Line 11-15):

"....it is highly prejudicial. I am sure you recognize it and I know it was inadvertent on your part, but I just can't allow it to go forward. I have to try the case twice now."

(TR-15, Line 23-25):

"If Mr. Castellano wants to go ahead, I have got to go ahead, otherwise it is double jeopardy, and you will lose Mr. Shatz....."

(TR-19, Line 21-25):

".....and that if there is any prior criminal activity, with respect to the defendant Harold Shatz, it only relates to those prior crimes that he has referred to which are in the Government's submission are.."

(TR-20, Line 3-13):

"It is an important aspect of our jurisprudence, and you must folow the instructions I am going to give you now, that evidence of any other crime, wrong, or act is not admissible and may not be considered by you to prove the character of a person who is a defendant in order to show that he acted in conformity therewith. That is it absolutely impermissible under our law to conclude that because a man may have doe. a bad act in the past----and I want to make it plain there is nothin, to indicate that here....."

See the United States vs. Ott, 42 L. W. 2319, (CA7, 12/5/73), and .

United States vs. Wasko, 473 F. 2d 1282 (1973):

"Although it has been held that a personal opinion of guilt will not constitute reversible error if the speaker does not suggest that he has undisclosed facts at his disposal, see United States vs. Sawyer, 347 F. 2d 372, 373 (4th Cir. 1965), the statement here cannot be said to rest entirely upon the record before the jury. Nor can this case be brought within those holdings permitting a more lenient standard following a personal attack on opposing counsel. See United States vs. Battiato, 204 F. 2d 717, 719 (7th Cir.), cert. denied, 346 U.S. 871 74 S. Ct. 118, 98 L. Ed. 380 (1953). But cf., Greenberg vs. United States, 280 F. 2d 472, 475, n. 4 (1st Cir. 1960)(critizing certain language in Battiato). As the court stated in Greenberg, supra.

"To permit counsel to express his personal belief in the testimony (even if not phrased so as to suggest knowledge of additional evidence not shown to the jury), would afford him a privilege not even accorded to witnesses under oath and subject to cross-examination. Worse, it creates thfalse issue of the reliability and credibility of counsel. This is particularly unfortunate if one of them has the advantage of official backing. The resolution of questions of credibility of testimony is for impartial jurors and judges. The fact that government counsel is as he says, and advocate is the very readon why he should not impinge upon his quasi-judicial function. We believe the cannon to be elemental and fundamental." 280 F. 2d at 475.

In the United States vs. Diamond, 471 F. 2d 771 (1973); the Court said:

"The constitutional principles that petitioner seeks to have vindicated by means of his habeas corpus petition are so well established that we deem it sufficient to say that petitioner has alleged facts that, if true, establish a violation of the right to assistance of counsel on appeal....."

Attorney for co-defendant John Arroyo, showed the continuing prejudice exercised at trial:

(TR-18, Line 16-25):

"Mr. Castellano: To properly represent my client, I must, of necessity insist on going forward. It becomes certain the way the Government wants to try this case is to prove all the things they can against the Co-defendant (Shatz), and lay it off on my client, and it is obviously

to his interests if he has now a situation where he would have an opportunity to be tried alone as the application originally was. We are in a position here....." (Emphasis added).

And the Government continued to deny due process of law to the petitioner by allowing Brugman to testify to impeach the credibility of the petitioner, by inference then giving him the "cloth of cover" under the Fifth Amendment when Brugman was himself being questioned:

Mr Chrein (Counsel for Brugman) (TR-86-Line 21-25):

"I feel my client (Brugman)is not a defendant in this case, in that he is taking the stand to vindicate himself. He is acting as a Government witness. He does not place his entire life on review as a defendant..."

Failure of the Court to clarify Braugman's true position was contrary to the Fifth, Sixth and Fourteenth Amendment Rights of this Petitinner. Such a denial is plain error and demands the only corrective remedy available, that is an Evidentiary Hearing Forthwith.

Harold Shatz, Petitioner Pro Se.

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on this date I have served by mail a true and correct copy of the within and foregoing Motion To Vacate Sentence to the United States Attorney's Office, for the Eastern District of New York, Brooklyn, New York, 10007, and mailing it by Certified Mail-Return Receipt Requested on this the 25 day of August, 1974.

Harold Shatz, Petitioner

SHATZ --vs-- UNITED STATES OF AMERICA

I. THE KNOWING AND INTENTIONAL USE OF PERJURED TESTIMONY BY THE GOVERNMENT WAS PREJUDICIAL TO THE PETITIONER

By the Government making a deal with their chief government witness (Co-defendant), they permitted him to testify that the government only promised him consideration on the Instant charge, and fail to fully develope the extent of the crimes for the State of New York for which the Government was instrumental in seeing that the witness only received a token sentence of 0-5 years for all of the State Robberies he was charged with. Further, the Government knowingly allowed the witness to take the 'Fifth' through the advice of his appointed counsel to prevent him from delving into the extent of his state charges to which he was involved in at that time, and in this way was a party to supression of evidence favorable to the defendant, with the full knowledge that the witness had been granted immunity from prosecution except to the extent of the token s entence of 5 years.

It has been clearly and conclusively established that where the Government knowingly and intentionally used perjured testimony to obtain a conviction, the conviction was invalid. Napue vs. Illinois, 360 U.S. 264, 3 L.Ed. 2nd 1217, 79 S.Ct. 1173, decided June 5, 1959, the United States Supreme Court, in a unanimous decision, reversed a conviction so obtained. In the Napue case, the facts are strikingly similar in that the principal state witness testified in response to a question by an Attorney for the State that he had received no promise of consideration in return for his testimony. The State Attorney knew that this testimony was false, but did nothing to correct it. Justice Warren in writing the Opinion, stated:

> "First, it is established that a conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment, (citations omitted) the same result obtains when the state, although not soliciting false evidence, allows it to go uncorrected when it appears, Alcorta vs. Texas, 355 U.S. 28, 2 L.Ed. 2nd 9, 78 S.Ct. 103; United States Ex Rel. Almeida vs. Baldi, 195 F. 2d 815; United States Ex Rel. Thompson vs. Dye, 221 F. 2d 763; United States Ex Rel Montgomery vs. Ragen, 86 F. Supp. 382. The principle that a State cannot knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The Jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence and it is upon such subtle factors that the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend" (Emphasis Added).

In another Supreme Court Decision factually on point, Giglio vs. United States, 405 U.S. 150, 31 L.Ed. 2nd 104, 92 S.Ct. 763, the prosecutor not only failed to disclose that a 'deal' had been made with the key witness against the defendant, but also elicited denials of any 'deals' from the witness when he testified.

In Giglio supra., Chief Justice Burger, in writing the unanimous opinion stated:

> "As long ago as Mooney vs. Holohan, 294 U.S. 103, 79 L.Ed. 791, 55 S.Ct. 340, this Court made clear that deliberate deception of a Court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice'. This was affirmed in Pyle vs. Kansas, 317 U.S. 213, 87 L.Ed. 214, 63 S.Ct. 177 (1942). In Napue vs. Illinois, 360 U.S. 264, 3 L.Ed. 2nd at 1217, 79 S.Ct. 1173 (1959), we said, 'The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.' Id., at 2609, 3 L.Ed. at 1221. Thereafter, Brady vs. Maryland, 373 U.S. 87, 10 L.Ed. 2nd at 218, held that suppression of material evidence justifies a new trial 'irrespective of the good faith or bad faith of the prosecution' (citation omitted). When the 'reliability of a given witness may well be determinative of guilt or innocence' non-disclosure of evidence affecting credibility falls within this general rule.' Napue, supra., at 269, 3 L.Ed. 2nd at 1221. We do not, however, automatically require a new trial whenever 'a combing of the prosecutor's file after the trial has disclosed evidence that may be possibly useful to the defense but not likely to have changed the verdict....' United States vs. Keogh, 391 F. 2d 138. A finding of materiality of the evidence is required under Brady, supra, at 87, 10 L.Ed 2nd at 218. A new trial is required if 'the false testimony could....in any reasonable likelihood have affected the judgment of the jury...' Napue, supra., at 271 3 L. Ed. 2nd at 1222."

The Supreme Court as recently as March 18, 1974, reaffirmed its position in Giglio, supra, and Napue, supra, in the case of DeMarco vs. United States, Case No. 73-5684, when it granted a Writ of Certiorari to the United States Court of Appeals of the Seventh Circuit. In that case, the Court stated, in granting the Petition of Certiorari:

> "Unquestionably, had there been a promise to the witness prior to his testimony, Giglio vs. United States, 405 U.S. 150 (1972) and Napue vs. Illinois, 360 U.S. 264 (1959), would require reversal of Petitioner's Conviction."

In further applicable Cases, Reager vs. United States, 438 F. 2d 515 (1973) The Fifth Circuit on July 6, 1973; the United States vs. Tashman, 478 F. 2d 129

In Washington vs. The State of Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed. 2nd at 1019 (1967), where the Supreme Court held:

> "Common sense would suggest that he (the alleged accomplice) often has a greater interest in lying in favor of the prosecution rather than against them, especially if he is still awaiting his own trial or sentencing. To think that criminals should lie to save their fellows but not to obtain favors for the prosecution for themselves is to clothe the criminal class with more nobility than one might expect to find in the public at large."

II. PREJUDICIAL OF COURT INSTRUCTIONS AND INFLAMATORY STATEMENTS AGAINST THE DEFENDANT.

See the transcript where U.S. Attorney states that Shatz picked other criminals for the job. Such remarks were intended to inflame the jury and were prejudicial to the defendant, see specifically:

U.S.-Brown, 351 F. 2d 1231; Gradsky vs. United States, 373 F. 2d 706; Lawn vs. United States, 355 U.S. 339; McMillar vs. United States, 363 F. 2d 165; Dunn vs. United States, 307 F. 2d 883; Steel vs. United States, 222 F. 2d 628.

The fact that the Court would tell the jury to "disabuse your minds of that statement" cannot remove the prejudice. The fifth Circuit reversed a conviction of improper argument in Ginsberg vs. United States, 257 F. 2d 950, where there was no objection to the argument and no corrective charge given. The Court said:

> "We hold that this statement of the prosecuting attorney constituted 'plain error' ****affecting substantial rights' under Rule 52(b), 18 U.S.C.A., Governing criminal procedure. It was such an error, also, as would have been magnified in it's influence on the jury by an objection and motion for mistrial."

See further, Nalls vs. United States, 240 F. 2d 707. Opinions of prosecutors or defense counsel are not issues to be submitted to the jury. The statements made by the District Attorney could not be based on evidence to be presented or actually presented. Otherwise stated, one "cannot unring a bell"; "after the trust of the saber it is difficult to say forget the wound"; and finally, "if you throw a skunk into the jury box, you cannot instruct the jury not to smell it."

In Greenberg vs. United States, 280 F. 2d 472 (1st Cir 1960), the Government Attorney had vigorously argued his belief in the evidence and the consequent guilt of the accused. Quoting Cannon 15, of the Canons of Professional Ethics of the American Bar Association, the Court reversed a tax evasion conviction, holding that it was error to allow the prosecuting attorney to express his opinion or belief in the evidence. Taking the test used in McMillian vs. United States, 363 F. 2d 165:

> "The inquiry should be whether the prosecutor's expression might reasonably lead the jury to believe that there is other evidence, unknown or unavailable to the jury, on which the prosecutor was convinced of the accused's guilt." (Emphasis added).

The inference that Shatz got criminals would permit the jury to infer that Shatz had a long history of criminal involvement wherein he had the knowledge of selecting the right criminal 'expert' for the right job. See the United States vs. Wasko, 473 F. 2d 1282 (1973):

> "Although it has been held that a personal opinion of guilt will not constitute reversible error if the speaker does not suggest that he has undisclosed facts at his disposal, see United States vs. Sawyer, 347 F. 2d 372, 373 (4th Cir. 1965) the statement here cannot be said to rest entirely upon the record before the jury. Nor can this case be brought within those holdings permitting a more lenient standard following a personal attack on opposing counsel. See United States vs. Battiato, 204 F. 2d 717, 719 (7th Cir.), cert. den. 346 U.S. 871, 74 S.Ct. 118, 98 L.Ed. 380 (1953). But cf., Greenberg vs. United States, 280 F.2d. 472, 475, n. 4 (1st Cir. 1960)(criticizing certain language in Battiato). As the Court stated in Greenberg, supra.:
>
> "To permit counsel to express his personal belief in the testimony (even if not phrased so as to suggest knowledge of additional evidence not shown to the jury), would afford him a privilege not even accorded to witnesses under oath and subject to cross examination....."

See also United States vs. Cotter, 425 F. 2d 450, 453 (1st Cir. 1970).

POINT III. CONFLICTING CHARGES TO THE JURY BY THE COURT.

See the Motion and Memorandum of Law to the fact situation, then refer to: United States vs. Paleamo, 259 F. 2d. 872; United States vs. Sallisy, 360 F. 2d 699; Malone vs. United States, 238 F. 2d 851; Flaherty vs. United States, 355 F. 2d 924; United States vs Collin, 166 F. 2d 123; Quercia vs. United States, 289 U.S. 466, 53 S.Ct. 698, 77 L.Ed. 1321; Huffman vs. United States, 297 F.2d 754.

POINT IV: SELECTIVE PROSECUTION:

During the course of the trial it became apparent that the Government (and even the Court) were only interested in prosecuting Shatz to the fullest. See the minutes where at a point, there was a discussion as to a mistrial as to co-defendant and the Court said 'we'll lose Shatz too' (to thant effect)----See the United States vs. Falk, 479 F. 2d. 616 (7th Cir. 1973--this whole case is right on point.

POINT V: DENIED HIS PETITIONER THE FIFTH AMENDMENT RIGHT OF REMAINING SILENT:

Shatz did not take the stand and the Court permitted the witness to testify as to prior criminal acts of he and Shatz--then on Shatz' attempt to cross examine, the Court permitted the witness to take the Fifth Amendment, after having permitted Shatzs' Fif Amendment Right against self-incrimination to be violated through the witness' testimony.

POINT VI: IS MOOT WITH THE GRANTING OF THE HEARING.

PRELIMINARY STATEMENT

On March 27, 1972 a Grand Jury for the Eastern District of New York returned a two count indictment charging Edward Brugman, Efrain Rodriguez, John Arroyo and the Petitioner, Harold Shatz, with twice conspiring to obstruct commerce by extorting money from banks with the consent of bank employees, obtaining said consent through the use of threats of violence, in violation of Title 18 United States Code, Section 1951.

On July 31, 1972, Efrain Rodriguez pled guilty to the first count of the indictment and Edward Brugman pled guilty to a superseding information charging him with conspiring to enter a bank with intent to commit a felony therein, in violation of Title 18 United States Code, Section 371.

The trial of John Arroyo and Harold Shatz on the original indictment commenced on Friday, October 13, 1972 before this Court. On Monday, October 16, 1972, a mistrial was granted as to Arroyo, and on October 18, 1972 while the jury was deliberating in petitioner's case, Arroyo pled guilty to a superseding information charging him with conspiring to enter a bank with intent to commit a felony

therein, in violation of Title 18, United States Code, Section 371. Later that day, the jury found the petitioner guilty of both counts. Shatz was then sentenced to ten years imprisonment on each of the counts, the sentences to run concurrently.

On his appeal, petitioner argued that the trial court committed reversible error on four occasions by: (1) permitting the jury to consider the testimony of Edward Brugman; (2) by failing to grant a mistrial following the prosecutor's opening; (3) by failing to grant a mistrial following the receipt of two jury notes indicating deadlock; and (4) by admitting into evidence proof of other crimes.

The United States Court of Appeals for the Second Circuit affirmed petitioner's conviction without opinion.

On this motion petitioner seems to be arguing that the sentence of this Court is subject to collateral attack in that: (1) the Court imposed sentence without benefit of a presentence report; (2) the Respondent failed to reveal the promises made to one of its trial

---

Petitioner's Appellate Brief attached hereto as exhibit "A". Respondent's Appellate Brief attached hereto as exhibit "B".

witnesses, and (3) the Court failed to grant a mistrial following the Respondent's opening remarks at trial.

ARGUMENT

I

A Presentence Report Was Not a Necessary Prerequisite to Petitioner's Sentencing

As petitioner readily admits, the Federal Rules of Criminal Procedure provide that the Court has the discretionary power to impose sentence without first receiving a report from the probation service.*

At the time of sentencing, petitioner faced the possible imposition of two consecutive twenty year sentences as he had been found guilty of two separate and distinct violations of Title 18, United States Code, Section 1951. This Court, in fact, showed great leniency in imposing ten year concurrent sentences on these counts. Petitioner fails to offer any reason as to why the Court should have delayed imposition of sentence until the receipt of a presentence report.

Petitioner also alleges that this Court should have absolutely disqualified itself from imposing sentence, as it had heard the evidence in the case. Clearly, petitioner, in that, presents the strongest possible argu-

*Fed. R. Crim. P. 32(c)(1)

ment in support of the opposite conclusion. As to petitioner's implicit claim of bias on the part of the Court, it is totally without support.

II

All Promises Made to the Witness Edward Drugman Were Carried Out at Trial

Respondent's promise to allow Edward Drugman to plead to a lesser offense was well known to petitioner at trial. In fact, Petitioner's trial attorney devoted substantial time during Drugman's cross-examination exploring this very subject (R 104-110).*

III

The Court's Decision Not to Grant a Mistrial Cannot be Litigated

An examination of petitioner's appellate brief (Exhibit "A") reveals that petitioner's last claim, the failure of the Trial Court to grant petitioner a mistrial following Respondent's opening at trial** was a primary and decisive issue on petitioner's appeal. As the Court

---

*Parenthetical entries throughout the brief with the prefix "R" refers to the consecutively numbered trial transcripts of October 16 and 17, 1

**A [illegible] which was made by petitioner's codefendant and not joined in by petitioner.

of Appeals for this Circuit stated in Meyers v. United States, 445 F.2d 37,38 (2nd Cir. 1971). "The case law, however, is virtually uniform in holding that once a matter has been decided adversely to a defendant on a direct appeal, it cannot be relitigated in a post-conviction collateral attack." As this issue was decided adversely to petitioner on his direct appeal, his instant motion is a frivolous attempt to relitigate the issue.

A.A.

CONCLUSION

Petitioner's Motion Should Be Denied Without a Hearing

The files and records of the instant case conclusively show that petitioner is not entitled to relief.* The validity of petitioner's claims are determinable solely through an inspection of the trial transcript, appellate briefs and the Court of Appeals' decision. Clearly, therefore, the petition should be dismissed without an evidentiary hearing. Dalli v. United States, 491 F.2d 758, 760-61 (2nd Cir. 1974).

Respectfully submitted,

DAVID G. TRAGER
United States Attorney
Eastern District of New York

STEPHEN M. BEHAR
Assistant U. S. Attorney
(Of Counsel)

---

*28 U.S.C., §2255 provides in pertinent part: "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the Court shall ... grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto".

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK
BROOKLYN, NEW YORK

----------x

HAROLD SHATZ,

Petitioner

vs.

CIVIL ACTION NUMBER

74 C 1272

UNITED STATES OF AMERICA,

Respondent

----------x

TRAVERSE TO GOVERNMENT'S MEMORANDUM IN OPPOSITION OF PETITIONER'S MOTION

HAROLD SHATZ, Petitioner, states that the Memorandum in Opposition, Filed by the Assistant United States Attorney, STEPHEN M. BEHAR, makes it obvious that the only similarity between the issues presented on appeal and the issues presented in the instant motion is MR. BEHAR'S submission of a copy of the Appellant's Brief on Appeal, for lack of anything else to insert in his Memorandum of Opposition.

For clarification purposes, the Petitioner would show what was presented by MR. BEHAR as the Petitioner's issues, and what the issues are, would show as follows, with MR. BEHAR'S interpretation first: (1) "A Presentence Report Was Not a Necessary Prerequisite to Petitioner's Sentencing." The Petitioner did not allege that the Court imposed sentence without the benefit of a presentence report. THAT IS A FACT. The Petitioner stated that when the Court permitted

the Government's witness to testify about the petitioner's participation in non-related crimes, the Petitioner was denied his Fifth Amendment Right to remain silent, and such testimony would prejudicially influence the Court's imposition of a sentance, and as a matter of Judicial prudence; the Court should have ordered a presentence report to authenticate or disprove the unconstitutional testimony of the Government's Witness. However, the issue was not one of presentence report--it was the CONSTITUTIONAL ISSUE OF THE DENIAL OF THE FIFTH AMENDMENT PROTECTION AGAINST SELF INCRIMINATION.

(2) "All Promises Made to the Witness Edward Brugman Were Revealed at Trial." It is inconceivable that a representative of the Government could make such a statement; and continue with: "Respondent's promise to allow Edward Brugman to plead to a lesser offense was well known to petitioner at trial. In fact, Petitioner's trial attorney devoted substantial time during Brugman's cross-examination exploring this very subject (R-104-110)." Petitioner would suggest that MR. [illegible] read (TR. 86, Line 21-25), and then make this statement. Further, Petitioner would request that the Government produce the sentencing minutes on all of Mr. Brugman's cases where the Omnipotent arm of the Government extended it's influence beyond the case at bar to aid the witness, to "hold" his testimony. ANYTHING LESS THAN A FULL DISCLOSURE IS A DENIAL OF DUE PROCESS.

(3) "The Court's Decision not to Grant a Mistrial Cannot be Re-litigated." Possibly the Assistant United States Attorney should read the Brief of Appellant and compare it with the instant motion, then read Page 6, of this Petitioner's Motion, then determine what issues is being relitigated.

the Government's witness to testify about the petitioner's participation in non-related crimes, the Petitioner was denied his Fifth Amendment Right to remain silent, and such testimony would prejudicially influence the Court's imposition of a sentance, and as a matter of Judicial prudence; the Court should have ordered a presentence report to authenticate or disprove the unconstitutional testimony of the Government's Witness. However, the issue was not one of presentence report--it was the CONSTITUTIONAL ISSUE OF THE DENIAL OF THE FIFTH AMENDMENT PROTECTION AGAINST SELF INCRIMINATION.

(2) "All Promises Made to the Witness Edward Brugman Were Revealed at Trial." It is inconceivable that a representative of the Government could make such a statement; and continue with: "Respondent's promise to allow Edward Brugman to plead to a lesser offense was well known to petitioner at trial. In fact, Petitioner's trial attorney devoted substantial time during Brugman's cross-examination exploring this very subject (R-104-110)." Petitioner would suggest that MR. MEHAR read (TR. 86, Line 21-25), and then make this statement. Further, Petitioner would request that the Government produce the sentencing minutes on all of Mr. Brugman's cases where the Omnipotent arm of the Government extended it's influence beyond the case at bar to aid the witness, to "help" his testimony. ANYTHING LESS THAN A FULL DISCLOSURE IS A DENIAL OF DUE PROCESS.

(3) "The Court's Decision not to Grant a Mistrial Cannot be Re-litigated." Possibly the Assistant United States Attorney should read the Brief of Appellant and compare it with the instant motion, then read Page 6, of this Petitioner's Motion, then determine what issues is being relitigated.

Now to get back to the Petitioner's Motion, and the Grounds for relief submitted therein:

(1) KNOWING USE OF PERJURED TESTIMONY BY THE GOVERNMENT.

(2) PREJUDICIAL OPEN COURT INNUENDOS AND INFLAMMATORY STATEMENTS AGAINST THE PETITIONER.

(3) CONFLICTING CHARGES TO THE JURY BY THE COURT.

(4) SELECTIVE PROSECUTION.

(5) DENIED THE PETITIONER HIS FIFTH AMENDMENT RIGHT OF REMAINING SILENT.

(6) THE FILES AND RECORDS OF THE CASE CONCLUSIVELY SHOW THAT PETITIONER IS ENTITLED TO AN EVIDENTIARY HEARING.

If the Assistant United States Attorney would confine his Opposition to the Issues raised, and if the Court will grant the Evidentiary Hearing that the Petitioner is entitled to, then we can say that justice can be had in the Courts.

Respectfully submitted,

Harold Shatz, Petitioner Pro Se.
United States Penitentiary
P.M.B. - 70630-190
Atlanta, Georgia 30315

Dated this_____day of
October, 1974.

CERTIFICATE OF SERVICE BY MAIL

I, the undersigned hereby certify that I have mailed a copy of the foregoing Traverse to Government's Memorandum in Opposition of Petitioner's Motion, to the attention of STEPHEN M. KAHAN, Assistant United States Attorney, Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201, by placing it in a pre-addressed, properly stamped envelope, and depositing it in the United States Mails at the United States Penitentiary, Atlanta, Georgia, on this 1 day of October, 1974.

Harold Shatz, Petitioner Pro Se.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------X

HAROLD SHATZ, :

Plaintiff, :

-against- : 74C 1272

UNITED STATES OF AMERICA, :

Defendant. :

----------X

United States Courthouse
Brooklyn, New York

March 24, 1975
10:30 o'clock a.m.

B e f o r e :

HON. JACK B. WEINSTEIN,

U.S.D.J.

FRANCES KARR
COURT REPORTER

Appearances:

DANIEL GOTLIN, ESQ.
Attorney for Plaintiff

DAVID G. TRAGER
United States Attorney
Eastern District of New York

By: STEVEN BEHAR
Assistant United States Attorney

* * *

MR. GOTLIN: Your Honor, this is a 2255 petition and as I informed the court the other day essentially there are numerous papers that Mr. Shatz submitted pro se and I am not going to amplify on those papers. All those papers I have submitted on his behalf already. Essentially it is going to be a hearing based on one of the allegations and that is the allegation concerning perjury in Mr. Brugman's testimony. We are claiming certain promises were made to Mr. Brugman and threats in order to induce him to testify against Mr. Shatz. There is a great deal of case law to that effect.

THE COURT: You had a full opportunity at the trial. It was fully explored at the trial. I do not see how anybody could have impeached Mr. Brugman any more than he was impeached. The defendant had excellent counsel as I recall and the cross-examination by defendant's counsel was extensive. How long did the examination take, if you will recall?

MR. BEHAR: It went on for the better part of one day on into the next day, your Honor.

MR. GOTLIN: The question involves his perjured testimony and promises that were made and that is essentially what we are dealing with, not that he lied on the witness stand as to essential facts in the case but as to the promises that were made to him.

THE COURT: In what respect?

MR. GOTLIN: Well, I believe he will come out now and testify to your Honor that the United States Attorney's office and the Nassau County District Attorney's office, all of them together promised him a sentence to five years.

THE COURT: How much did he get?

MR. GOTLIN: He got that five years.

THE COURT: Nobody discussed that with me when he took his plea.

MR. GOTLIN: I have spoken to Mr. Brugman, your Honor.

THE COURT: Are you contending that the United States Attorney made him a promise and then did not stop him from lying on the witness stand?

MR. GOTLIN: Yes.

THE COURT: All right, you can have a hearing. Call your witness.

MR. BEHAR: Your Honor, can we have excluded, unless counsel intends to call him now, any witnesses?

MR. GOTLIN: There is a possible witness, Mr. Fisher. He can step outside.

THE COURT: All witnesses will be excluded from the courtroom.

MR. GOTLIN: We ask Mr. Brugman be called, your Honor. I believe he is in detention.

MR. BEHAR: Yes, your Honor.

THE COURT: Bring him up.

Have you seen the probation report?

MR. GOTLIN: Yes, your Honor, I have.

THE COURT: Have you had a proper chance to discuss it with your client?

MR. GOTLIN: Yes, briefly.

THE COURT: You can have as much time as you want. There is no rush in this courtroom. We have all the time in the world.

MR. GOTLIN: I understand.

MR. BEHAR: Your Honor, if additional

witnesses are necessary on this point I have been in contact with Mr.Chrein of the Legal Aid Society and Mr. Krinsky who was formerly with the Legal Aid Society. Both of them represented Mr. Brugman at different points during the proceedings here. Mr. Krinsky, who was primarily responsible for Mr. Brugman's defense is on trial now in the state court and told me that if the court would permit he would have absolutely no objection to coming in the early evening at the end of the trial day over at the state court if his testimony is necessary.

A L B E R T O B R U G M A N , called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

MR. GOTLIN: Speak up in a loud, clear voice, Mr. Brugman.

DIRECT EXAMINATION

BY MR. GOTLIN:

Q Mr. Brugman, are you here today voluntarily?

A Yes.

Q Of your own free will?

A Yes.

Q Did anybody force you to testify today?

A No.

Q Anybody promise you anything?

A No.

Q To testify?

A No.

Q You are doing this of your own free will?

A Yes.

Q Mr. Brugman, you recall testifying in the case against Mr. Shatz, don't you?

A Yes.

Q Do you recall when originally you were arrested in October 1971?

A Yes.

Q On a burglary charge in Brooklyn?

A Yes.

Q Could you tell the Court what happened a day or so after you were arrested for this burglary charge in October 1971 in Brooklyn? Did anybody come to see you at that time?

A Well, when I was arrested on the 18th and on Friday the FBI Nassau office came to see me.

Q Where was that?

A In the Brooklyn House of Detention.

Q What happened pursuant to that?

A Well, the FBI showed me a picture of Harry Shatz, Cordova, Steven Rodriquez and myself and they mentioned I was involved in a conspiracy to rob a couple of banks and do I know anything about this. The Nassau County police came to see me first instead of the FBI. They both came the same time.

Q The same day, you mean?

A The same day,and they asked me do I know about them. I seen they had already had the information they had and I said yes, I did. He told me what and I explained to him.

Q Now after that conversation did there come a time - - first, did the Nassau County police at that time or the federal agents make any promises or threaten you in any way in order to get you to say anything to them?

A No, not at that time.

Q I take it a short time after you were arrested for the robbery, the bank robbery, and for the incident in Nassau County, is that right?

A Yes.

Q Did there come a time when you spoke to a district attorney out in Nassau County and to the United States Attorney Mr. Behar with reference to this case?

A Yes.

MR. BEHAR: Could we have the district attorney out in Nassau County identified, please?

Q Do you know the name of the district attorney in Nassau County?

A DeAngelo or something it was, I am not sure.

Q Did the Nassau district attorney that you spoke to threaten or make any promises to you in order to induce you to testify?

A Yes.

Q Was he the first one you spoke to or did you speak to Mr. Behar before you spoke to the Nassau County district attorney?

A I don't remember back and forth, I was going back and forth - - I don't remember.

Q Tell us what happened out in Nassau.

MR. BEHAR: Can we have the time frame?

Q Approximately when was this that you first spoke to them?

A Well, let me see. I got mixed up there - - about January, February in Nassau County. And in the spring, the beginning of spring I spoke to the district attorney over here for the federal government.

Q Indicating Mr. Behar, is that right?

A Yes.

Q Tell us what happened in Nassau County. Did anybody threaten you or promise you anything in order to get you to testify out there?

A Well I was charged with three armed robberies, burglary and grand larceny and they told me that if I don't cooperate that they was going to put me away for a long time.

Q Did they say how long?

A I was facing twenty-five years. They say they were going to indict me separately and I figured seventy-five years and unless I cooperated because they wanted Harry Shatz and I cooperated.

Q Now were you already serving a sentence at that time?

A I got sentenced for New York State.

Q Was that in Brooklyn?

A Yes.

Q What was the sentence in Brooklyn?

A Five years.

Q An indeterminate sentence of up to five years?

A Yes.

Q What promise did they make you if any out in Nassau?

A They said that they would run all the indictments together and I wouldn't get more than five years and they run my time together with the New York State if I testified against Harry Shatz and if I don't I would receive - -

Q And did you testify in the grand jury out in Nassau against Harold Shatz?

A Yes.

Q Some time after that you spoke to Mr. Behar, is that right?

A Yes.

Q Did Mr. Behar make you any threats or make you any promises when you first came to his office?

A Well I was charged with two bank conspiracies and Mr. Behar told me that if I don't cooperate with him on the indictment he could give me twenty years. One carried twenty years and if I cooperate he help me out and I asked him if the court is going to promise me something and he said that the court don't promise, don't make no promises, that he takes care of it, he runs it, but I understood that he will run my time together and I would get no more than five years and if I don't cooperate he will give me the twenty years, indictment for twenty years.

Q And so you testified against Mr. Shatz, is that right?

A Yes.

Q At that time did you have any animosity toward Mr. Shatz?

A I certainly did.

Q Can you tell the Judge why you disliked Mr. Shatz at that time?

A Well as I understood - -

THE COURT: This all was brought out at the trial, wasn't it? It was clear there was animosity?

MR. GOTLIN: I will go into something else, Judge. This particular point was not brought out at the trial.

THE COURT: Go ahead and develop it if you want to. There is no doubt in my mind or in anybody's mind there was animosity at the time but if you wish to examine.

MR. GOTLIN: I will go into something else.

Q Approximately how many times did you see Mr. Behar before you testified at the trial?

A I saw him quite a few times, about five times. I don't remember the numbers but it was quite a few times. I was up in his office and stood there quite a long while

going over the testimony, going over and over to say the right thing in court. And one incident, we was going, I was explaining the story to Mr. Behar, how me and Harold and the other individuals went about to do this thing, this crime, and during one of the things I told Mr. Behar that when he extorted ransom money instead of $250,000 we asked for $150,000 because we took the woman, the wife of the bank manager and he might not like her and he say "Keep her" and therefore we got to ask for something small.

THE COURT: We went through this.

Q Did Mr. Behar tell you in any way how to answer certain questions or if certain questions were posed to you?

A No, he just made it clear to make sure that I say this. He told me how to answer, make sure I bring it out.

Q Did he say anything to you about Mr. Castellano, Mr. Shatz's lawyer at the time, if he asked you anything about whether any promises were made to you?

A Yes.

Q Did he say anything to you about a question of that type?

A Yes.

Q What did he say?

A He said if the court asks me.

Q If the court or the lawyer?

A Well I am talking about the court, the lawyer, the whole thing here, if they ask me about anything that there was a deal, a promise made, I say no, no promises was made and he asked me, told me if Mr. Castellano, Mr. Shatz's lawyer, asked me if I was supposed to consent and what was my charge and convicted that I was going to get sentenced for, to tell him it was for conspiracy bank robbery maximum five years and I was going to get sentenced by Judge Weinstein and he told me to say this, right from or in front of the same judge I was going to get sentenced.

Q Do you recall testifying at the trial and I am going to ask a question and the response given on Page 105 from the transcript, Lines 22, 23 and 24? Do you recall being asked this question and giving this answer and this is by Mr. Castellano:

"Q Were any promises made to you by the Federal Attorney's office in consideration of your testifying here?

"A No."

Do you recall being asked that question and giving that response at the trial?

A Yes.

Q Did anybody tell you to answer that

particular question with the response of no?

A Mr. Behar.

Q Was it your understanding that any promises were made to you however in order for you to testify?

A Yes.

Q What was the understanding that you had, that you thought was going to take place?

A My understanding, the impression I got, the understanding I already have of five years from New York State and five years from Nassau County and if I cooperate with the government my understanding that they give me five years running together with New York and Nassau County.

THE COURT: What was the date on which he testified?

MR. BEHAR: The date he testified was the 16th and 17th, 1972.

THE COURT: What month?

MR. GOTLIN: October, your Honor.

THE COURT: He had already pleaded guilty before me in July.

MR. GOTLIN: Yes, he had pleaded guilty. He was just awaiting sentence.

THE COURT: He had pled guilty to the five year count.

MR. GOTLIN: I understand that, your Honor.

THE COURT: Your contention is Mr. Castellano did not know that?

MR. GOTLIN: I am not contending Mr. Castellano knew. I don't know whether he knew at the time Mr. Brugman had pleaded guilty.

MR. BEHAR: It is clear in the cross-examination.

THE COURT: Certainly.

MR. GOTLIN: He certainly didn't know what happened in Nassau according to the cross-examination. That is not my point. He had not been sentenced yet.

THE COURT: I do not understand the point.

MR. GOTLIN: Well the point is that Mr. Brugman - - what I am saying to you when this question was asked about any promises being made there is a question as to the five years, whether there was going to be a recommendation it run concurrently or whether it run consecutively. That is what I am getting at.

THE COURT: All right.

BY MR. GOTLIN:

Q Mr. Brugman, was it your understanding that this 5-year plea that you took in Federal Court was to run concurrently with your State time?

A Yes.

Q Who told you that it would run concurrently?

A Mr. Behar. He didn't tell me, I don't remember the words. He told me, he said the court, Mr. Weinstein, he makes no promises, you know. And how about running my time together I mentioned with the other thing and he said don't worry about it, he would talk up for me, that he would take care of it. It was true my time would run together and that is why I cooperated. This is the understanding I had.

Q But when you were asked by Mr. Castellano at the trial whether any promises were made to you in consideration for your testifying at the trial did Mr. Behar tell you how to answer that question? Did he tell you whether to answer yes or no?

A He told me to answer no because the court don't make no promises and he was speaking about my judge Weinstein, Judge Weinstein, and he told me I said no.

Q That was not your understanding?

A No.

Q Your understanding was there was going to be a promise and Mr. Behar was going to see to it you only got five years concurrent with what you were doing, is that right?

A Yes.

Q How many times approximately did you see Mr. Behar again in his office?

A Quite a few times, more than three or four for sure, I know this because I stood up there and he bought me lunch. I was there quite a while, two or three hours sometimes going over the things just keeping going over it.

Q Did he prompt you and coach you on how to respond to certain questions?

A Yes.

Q There were two occasions he told you how to answer questions? Did he ever at other times tell you where certain questions were posted how you should answer the question or what you should say in response to a question?

A Well, he told me to make sure that I say certain things, small little things but it proves you know that I am telling the truth because I remember little specific things that really make no sense but to bring it out like

for instance, like the one about how much money would you ask for 250 or 150,000 and he said to make sure I bring this out, you know, stuff like that.

Q Mr. Brugman, did the United States Attorney ever tell you to stretch the truth when you were on the witness stand?

A I don't know what you mean by "stretch the truth."

Q Nobody ever told you to lie on the witness stand, is that right?

A No.

Q The only time you were told really to give us certain answer is if the question was asked whether any promises were made to you in order for you to testify, is that right?

A Yes.

Q Mr. Behar specifically told you to answer no to that question, is that right?

A Yes.

Q Were there any other occasions other than that and one other incident you mentioned where Mr. Behar told you what to say or did he tell you what to say under any circumstances?

A I don't remember.

Q Other than those two incidents? As to the

case in Federal Court, is that right?

A Yes.

Q And what was your sentence?

A I got five years back to back.

Q Consecutively?

A Consecutively.

Q Did something happen after that?

A I was in Sing Sing a month, I don't remember, a month's time, I think it was, about a month's time, and I received a official paper saying that my time was running together so I didn't believe this because I asked the gentleman and he told me no so I wrote to Mr. Weinstein and I received a letter from him, that is Mr. Krinsky, stating that my time was running together.

Q Mr. Brugman, when you spoke to the United States Attorney all this time was there a lawyer present with you, I mean your lawyer, Mr. Krinsky?

A No.

MR. GOTLIN: I have no further questions.

THE COURT: I have a copy of the commitment. My copy shows five years without any recommendation.

MR. BEHAR: The recommendation is at

the bottom to serve simultaneous.

THE COURT: That was the sentence I imposed at the time. Was that a modification?

MR. BEHAR: No, your Honor, it is part of the file.

THE COURT: This is what I imposed at that time?

MR. BEHAR: Yes, your Honor.

THE COURT: I want to explain it to you because you seem to be confused about it.

When I sentenced you I recommended to the Attorney General that he designate the State Penitentiary as the place to serve your Federal sentence which has the effect of being a concurrent sentence. I could not give you a concurrent sentence because I had no power to do so. The reason that subsequently you got the notice was that the Attorney General followed my recommendation. I did not have the power. The Attorney General had the power and that is why that happened. But at the time of sentencing I did what I could to see you would get a concurrent sentence and that is why you are serving as you are now. Do you understand

it now?

THE WITNESS: Yes, I understand.

CROSS-EXAMINATION

BY MR. BEHAR:

Q Mr. Brugman, you stated before that you did not remember the words that we used in discussing the 5-year sentence and whether or not it would run concurrently, is that right?

A Yes.

Q I ask you to take a look at Page 176 of the transcript of the trial, Mr. Shatz's trial, specifically Lines 5 through 19. Read them nice and slowly, Mr. Brugman.

A Aloud?

Q No, to yourself, and I ask you if those words refresh your recollection. Do they refresh your recollection, Mr. Brugman?

A Yes.

Q Were those statements true when you made them then?

A No.

MR. BEHAR: Counsel has seen it?

MR. GOTLIN: Yes.

THE COURT: The Court is examining

Page 176. You might as well read it for the record so we will have the record complete for appeal purposes.

"REDIRECT EXAMINATION

BY MR. BEHAR:

"Q The three armed robberies that you pled guilty to, were those the three that you described on your direct testimony where you used the mailman's uniform?

"A Yes.

"Q Were you ever told that your terms were going to run at the same time they were going to be concurrent for this sentence and the one out in Nassau County?

"A Concurrent?

"Q Yes.

"A No.

"Q Did I ever tell it to you?

"A No.

"Q Did Mr. Chrein ever tell it to you?

"A No."

Mr. Brugman, were you willing to testify for the Federal Government in this case from the first time you were visited by the FBI?

A No, not right away.

Q Did you not discuss this case with Mr. Chrein before you ever saw me?

A I didn't understand the question.

Q Did you see Mr. Chrein before you saw me?

A I believe so, yes.

Q Did you discuss with Mr. Chrein what deal you could make before you ever agreed to discuss this case with me?

A No.

Q You never discussed the fact that you were going to plead guilty to a 5-year count before you discussed this case with me?

A No. We discussed - - I was charged the way Mr. Chrein told me and then I had five years. I had one count five years bank conspiracy and another count twenty years bank conspiracy. The one count of five years, the one we planned but we never acted on it, we never carried it out and the count twenty years we made an act which carried twenty. This is how he explained it to me.

Q Did Mr. Chrein tell you that you had been or were going to be charged with two 20-year bank extortion counts and he was going to try to get you a plea to a 5-year count?

A He told me I was going to be charged one twenty year and one five year and he told me the difference because both were bank conspiracies and I didn't understand and I told him to break it down for me, to explain and he told me what I just finished explaining.

Q And you remember that clearly?

A Yes.

Q Before you ever talked to me were you told by Mr.Chrein that your deal had been made?

A He told me that the District Attorney wanted,Mr. Krinsky wanted me to testify and he will give me, you know - - make - -

Q Did Mr. Chrein let you talk to me before he told you that your deal had been made?

A He told me that you told him that this is the deal you was offering me, you know, and since I want to have it checked anyway no matter what I said we could talk but you told him this is the deal because you was the prosecutor.

Q Did you know from Mr. Chrein that your plea had been arranged before you talked to me?

A No.

Q Didn't you plead guilty before you talked to me?

A No.

MR. BEHAR: No further questions.

MR. GOTLIN: I have one question on redirect.

REDIRECT EXAMINATION

BY MR. GOTLIN:

Q Mr. Brugman, Mr. Behar showed you those minutes a little while ago that was just read?

A Yes.

Q Page 176. You read the question concerning whether your time was going to run concurrently and he asked you and I am quoting from Page 176: "Were you ever told that your terms were going to run at the same time, they were going to be concurrent for this sentence and the one out in Nassau?"

And your eventual response was:"No."

Did Mr. Behar tell you to answer that question that way?

A Yes, he told me if they asked me if I make a deal with the court you know to say no because the court, the Federal Court, don't make a deal like the New York State and Nassau County.

Q But he said he was going to take care of it for you, is that right?

A Yes.

MR. GOTLIN: Nothing further.

THE COURT: Thank you very much, Mr. Brugman. Before you leave however was your testimony at the trial apart from this point, honest and truthful?

THE WITNESS: Yes.

THE COURT: Thank you.

Call your next witness.

MR. GOTLIN: That is the case for the petitioner, your Honor.

THE COURT: The petition must be dismissed. The Court has examined this witness' case, the correspondence in 72-CR-919 referred to by Mr. Brugman including Mr. Brugman's letter of December 24, 1972, my response of January 3rd, 1973 and Mr. Chrein's letter at my request of January 10, 1973. The Court has examined the commitment order. The Court has also examined the pre-sentence report of Mr. Brugman and the recommendations of the other judges in this case. One judge of the other two judges agreed with me the sentence should be five years consecutively

and one judge recommended four years to be served - - no, I am sorry, one judge said five years consecutively and one judge said four years consecutively and I said five years concurrently if possible. I believe the witness was mistaken in his testimony that he had been promised a concurrent sentence by the United States Attorney. His testimony on the point is ambiguous but construing it in the light most favorable to the plaintiff Shatz it is unbelievable.

The Assistant United States Attorney was fully aware of the fact he could not make such a promise and that in fact the court could only make a recommendation. Even if what the witness says is true, that is the Assistant United States Attorney made such a statement to him beyond a reasonable doubt this would not have affected the verdict. These matters were thoroughly investigated at the trial and the evidence against this plaintiff Shatz was overwhelming on the issue of credibility. There was ample evidence with respect to bias, bad prior record and desire

to make a deal to avoid a long prison term and inconsistencies in the testimony of the witness.

This fact if it had been elicited would have made no difference in the total evaluation of the evidence. Under the circumstances the motion must be denied.

MR. GOTLIN: Exception to the decision, your Honor.

THE COURT: In addition, you made the point in the papers that the defendant was sentenced without a pre-sentence report.

MR. GOTLIN: Yes, your Honor. I know your Honor is aware there is a probation report now.

THE COURT:There is a probation report. If you wish I will set aside the sentence and hear you on the matter and resentence.

MR. GOTLIN: Yes, your Honor.

THE COURT: Is that what the defendant wishes?

MR. GOTLIN: Yes, your Honor.

MR. BEHAR: Before we go to the next matter might I just state to the Court that

the witness was mistaken. I, as the Assistant involved and who prepared the case, I had previously contacted both Mr. Chrein and Mr. Krinsky. Mr. Chrein reviewed the file notes which had been found in a recent case in his district Legal Aid file, notice of motions with United States attorneys, and for those reasons I was prepared to call both these gentlemen to substantiate my statement at trial as to what the agreement was with this witness.

MR. GOTLIN: I might add I spoke to Mr. Chrein and Mr. Krinsky also. Mr. Krinsky had not seen the file I do not believe since he left the office and from what he told me he could not really recollect exactly what took place at the time.

THE COURT: The sentence previously imposed will be set aside on the ground it was imposed without a pre-sentence report, a practice which the Second Circuit has subsequently frowned upon. I will give the defendant the advantage of that subsequent ruling even though legally he is not entitled

to it.

MR. GOTLIN: Thank you, Judge.

THE COURT: What do you want to say?

MR. GOTLIN: Your Honor does have the full probation report and I have gone over it with Mr. Shatz. One thing it does not reflect and I know your Honor has received correspondence from Mr. Shatz's wife on a number of occasions. He has already served approximately thirty-one months now I believe on a 10-year sentence. The other people involved in this incident are all to be released, one I think is in Allenwood and will be released shortly and Mr. Brugman will be released some time this spring or early summer from custody after serving a 5-year sentence. Another man got six months for the incident, I believe.

I have spoken to Mr. Shatz on a number of occasions. One of the things that strikes me that he said to me and I think your Honor should consider he spoke to his son on the phone. His son is about nine years old and his son told him how he still misses him but he does not miss him as much and probably the

reason he doesn't miss him as much is that he cannot see him anymore. He lives in Florida and it is a terrible thing for a 9-year old boy to know your father is in jail and will be there for some time.

I think it is certainly so Mr. Shatz's behavior cannot be excused. I read the transcript and I have spoken to Mr. Shatz and I do not think he is asking your Honor to excuse what took place but I think he is asking your Honor to perhaps give him the opportunity to be able to produce in society and he has a brother that can provide a good job for him. I have spoken to his brother and I know he can provide a job opportunity.

I know his wife is working right now in Florida as a postal employee and there is a serious threat of the family breaking up if Mr. Shatz is to serve a 10-year sentence which your Honor had originally imposed.

Mr. Shatz, since he has been incarcerated, has received what is the equivalent of high school diploma. He is a bright man. I know the probation report reflects the fact he

served honorably in the Armed Service. As a matter of fact, he tried to get in when he was sixteen and he was in and they threw him out because he was too young. He went back and served in Korea and received several medals including the Silver Star. The only thing higher than a Silver Star is a Congressional Medal of Honor. They spoke very favorably in the military of him and for some reason or other his course of behavior took a turn for the worse and he has a long record.

He has not had an extensive period of incarceration such as he has had now. He indicated to me at Atlanta he is undergoing group therapy once or twice a week.

MR. SHATZ: I have been going for a year and a half.

MR. GOTLIN: And I do not think society would benefit any further by keeping Mr. Shatz incarcerated although it was a serious thing they undertook. Fortunately nobody was hurt and I think from reviewing Mr. Shatz's record I do not think anybody has ever been hurt in any of the incidents that he has been

involved in.

I think he is at the crossroads in his life now, your Honor, and I think if your Honor were to consider substantial reduction in his sentence and perhaps even at this point placing him on probation that I think your Honor would see Mr. Shatz's life will change. He is concerned about his family, perhaps not as much as he should have been. If he was concerned as he perhaps should he would not have gotten involved in this in the first place.

That is behind him, he has served thirty-one months and any further incarceration would be certainly not of a rehabilitative nature but would serve I think only to destroy whatever hope he might ever have of having a good family life again and perhaps even make him harbor feelings to society.

I know your Honor could have sentenced him to twenty years.

THE COURT: Forty years.

MR. GOTLIN: Forty years, I am sorry, twenty and twenty. I know your Honor was fairly lenient at that time, that is at the time of

sentence, and what I am asking for now is upon reconsideration of a man that is in his forties and has served thirty-one months and has created no problems where he is and has apparently adapted to prison life as adequately as he possibly could.

He has tried to further his education. I am asking your Honor to temper justice with mercy more than you originally did and perhaps consider giving him a chance to be on the outside again with a term of probation now and obviously if he does not live up to those terms he can be put right back where he just would be getting out of.

Certainly in our country today particularly if people have done in high office in government what has been done, as I am sure your Honor does not approve of either, they have been given chances and I am asking your Honor, I do not know if he ever received a chance or not, I am asking your Honor now after having served thirty-one months to give him the opportunity to show to your Honor, to show to society he can become a productive

member of society again.

Thank you.

THE COURT: Mr. Shatz, do you want to add anything to what your attorney has said?

MR. SHATZ: Yes, Judge. I meant to write about this about a year ago. I got a 4208 sentence. I met the Board every three months I was in Atlanta. They set me off thirty months which took away the (a)2 in one shot. I seen the Board in October. In Atlanta it is a little more difficult. The percentage of men making parole in Atlanta is a great deal lower than other parts of the country. Also, in Atlanta when I first arrived there I went to see the doctor and I tried to get psychiatric aid and I said I would like some help, I would like to know just why I do this and they asked me the question why I do it and I could not truthfully answer them. Evidently I needed help some way. Maybe they could give me an answer rather than waste time. It was just an impossibility to do such a thing. They said they have no medical facilities to do it. I have written also to

different people trying to go where they do. It is not available because I am in Atlanta. I could not get out of Atlanta. I tried from West Street to transfer to Lexington where I might get some help.

Parole, forget about it, it is remote, not forget about it but it is remote. When your Honor sentenced me to 4208(a)2 I think you had it in mind to do a third provided I behaved myself otherwise you would have just given me ten years. Immediately upon walking in there they took the (a)2 sentence.

My wife works hard as a post office worker many hours overtime to make ends meet. My brother said when I come out not to worry. He owns a business in Florida, a steel business in Fort Lauderdale and he would put me in the office and if I behave myself I will be all right.

My wife is a young attractive woman, she is French. She has no family in this country. We have a woman that takes care of my son when she goes to work. This woman has to return to France now, her passports were taken away from her and it means my wife has to leave

the post office. Needless to say there will be no jobs around and she will have problems. We have suffered a great deal, I have, my family has.

I think I can adjust. If I have to stay in prison any longer I would like some help. I can't see the point in keeping a man behind bars just forgetting him there. If you can help him you should help him. Naturally I would like to go out. I feel the crime is serious. I don't think it would be too much even to ask for but if I were to go out I am certain this could never happen again with me. I don't have that kind of background. My family was not like that.

THE COURT: Well, I understand the point and it is a persuasive point but it does not persuade me sufficiently because of the nature of this crime. The fact that you were a ringleader and that you did show no contrition up to this point - -

MR. SHATZ: Beg your pardon?

THE COURT: You showed no contrition up to this point. The matter has to rest

entirely in the hands of the Correction Authorities. I will file a new form that they have. I sentenced you to ten years pursuant to Section 4208(a)2 Title 18 on Counts One and Two, the sentence to run concurrently with time already served to be credited. I will recommend that you receive psychiatric and other treatment while you are incarcerated and I will make out a form to that effect and the United States Attorney will write a letter that that is my intention to the Correction Authorities. I am sorry I cannot do anything for you. This is a question of deterring others from this kind of crime. It is a most heinous type of crime in my opinion to kidnap a child and threaten a father.

MR. GOTLIN: Thank you, Judge.

* * *

STATE OF NEW YORK)
: SS:
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 9 day of June 1974 deponent served the within Appendix upon N.S. Attorney

attorney(s) for Appellee

in this action, at 225 Cadman Plaza E. Brooklyn, NY

the address designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this
9 day of June, 1976

William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976